IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HON'BLE THE CHIEF JUSTICE MR.H.L.DATTU
&
THE HONOURABLE MR. JUSTICE K.T.SANKARAN

SATURDAY, THE 18TH AUGUST 2007 / 27TH SRAVANA 1929

WA.No. 1866 of 2007

AGAINST THE JUDGEMENT IN WP(C) NO.17925/2007 Dated 24/07/2007

APPELLANT: PETITIONER

KAIKKARA CONSTRUCTION COMPANY,
KAITHAVARAM BUNGLOW, KANKATHU MUKKU, KOLLAM,
A PARTNERSHIP FIRM, REPRESENTED BY ITS
MANAGING PARTNER A.ABDUL SALAM.

BY ADV. SRI.P.B.SURESH KUMAR

RESPONDENTS: RESPONDENTS
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1. STATE OF KERALA, REPRESENTED BY THE
CHIEF SECRETARY TO GOVERNMENT,
GOVERNMENT SECRETARIAT, THIRUVANANTHAPURAM.

2. TENDER EVALUATION COMMITTEE FOR
KOYILANDY FISHERY HARBOUR PROJECT
(CONSTRUCTION OF BREAK WATERS),
REPRESENTED BY THE CHIEF ENGINEER, HARBOUR
ENGINEERING DEPARTMENT, GOVERNMENT OF KERALA,
THIRUVANANTHAPURAM.

3. THE SUPERINTENDING ENGINEER, HARBOUR
ENGINEERING NORTH CIRCLE,
CHAKKORATHUKULAM, ERANHIPALAM P.O.,
KOZHIKODE - 673 006.

4. THE SECRETARY, DEPARTMENT OF FISHERIES,
GOVERNMENT OF KERALA, THIRUVANANTHAPURAM.

5. ENGINEERING PROJECT INDIA LTD.,
3B EAST COAST CHAMBER, 92 G.N.CHETTY ROAD,
T.NAGAR, CHENNAI.

SPECIAL GOVERNMENT PLEADER SRI.C.T.RAVIKUMAR

THIS WRIT APPEAL HAVING COME UP FOR ADMISSION ON 30/7/2007, THE COURT ON 18/08/2007 DELIVERED THE FOLLOWING:

H.L.DATTU, C.J. & K.T.SANKARAN,J.

W.A. NO. 1866 OF 2007

Dated this the 18th August, 2007

JUDGMENT

SANKARAN, J.

The appellant challenges the judgment of the learned single Judge dismissing W.P.(C) No.17925 of 2007.

2. The appellant firm is a registered contractor. As per Ext.P2 notification dated 2.2.2006, the Superintending Engineer, Harbour Engineering North Circle, Eranhipalam, Kozhikode (third respondent) invited tenders for pre-qualification and for execution of the work in respect of construction of breakwaters for Quilandy Fishery Harbour Project. The tender proceedings were postponed due to administrative reasons. Later, notifications dated 9.3.2006 (Ext.P3), 21.4.2006 (Ext.P4) and 25.7.2006 (Ext.P6) were issued. The tender in question was to be submitted as per Ext.P6 notification dated 25.7.2006.

3. The estimated PAC of the work is Rs.2748 lakhs. One of the conditions in Ext.P6 is that only contractors/firms who had satisfactorily completed similar works costing at least more than 40% of the estimated PAC during the last five years can apply. The tenderers had to submit pre-qualification documents. The last date for submitting tenders was 26.9.2006. On that date, the pre-qualification tenders were to be opened and submitted to the Chief Engineer for scrutiny and for evaluation by a

committee constituted for that purpose. Only the tenders of the pre-qualified tenderers were to be opened later after due intimation. It is also stated in Ext.P6 that the conditions stipulated in G.O.(MS)No.43/99/IRD dated 0.6.1999 would be applicable to the tenders.

4. The appellant submitted its bid. There were five other bidders as well. The Pre-qualification Committee, consisting of the Chief Engineer, Irrigation and Administration, Thiruvananthapuram, Chief Engineer, PWD and Administration, Thiruvananthapuram and Chief Engineer, Harbour Engineering Department, Thiruvananthapuram, examined the pre-qualification documents and evaluated the merits and de-merits of the firms/contractors on the basis of the Government Order for pre-qualification. The Committee found that only M/s.Engineering Projects India Ltd., T.Nagar, Chennai (fifth respondent) and M/s.RDS Projects Ltd., Kadavanthara, Kochi were pre-qualified. The Committee referred the matter to the Government. The Government approved the pre-qualification. The financial bid of the pre-qualified tenderers were opened on 13.4.2007. The lowest offer made by the fifth respondent, M/s.Engineering Projects India Ltd., was accepted. The appellant challenged the pre-qualification process and the decision to disqualify it, in W.P.(C) No.34209 OF 2006. A learned single Judge by Ext.P8 judgment dated 11th April, 2007, directed the Government to consider the representation dated 4th April, 2007

(Ext.P7) submitted by the appellant. The Government considered the said representation and passed Ext.P10 order dated 6th June, 2007 rejecting the same holding thus:

> "Government have examined the matter in detail and the following observations are noted:
>
> M/s.Kaikkara Construction Company was not eligible for pre-qualification as per the terms and conditions of tender notification. The tenderer should have completed a similar single work of probable amount of contract and at least 40% of the value of the work tendered during the last five years to be pre-qualified. The only previous experience cited for pre-qualification by the firm is the construction of break water of Thankasseri, Kollam which was completed in a period more than 5 year prior to the date of tender in question. Government also observed that the firm was not able to complete any of the work entrusted by the Harbour Engineering Department in the originally agreed time as per the tender agreement.
>
> 5. Government therefore approve the recommendations of the pre-qualification committee, recommending to pre-qualify the two firms mentioned in para 1 above. The representation submitted by the firm as per Ext.P9 is rejected and orders issued accordingly."

5. In the Writ Petition, the appellant prayed for the following reliefs:

(i) declare that the decision of respondents 1 to 4 to award the work covered by Exhibits P2 and P6 notifications to the fifth respondent is arbitrary, illegal, unfair and against public interest.

(ii) Issue a writ of certiorari or any other appropriate writ, direction or order calling for records leading to Exhibit P10 order of the Government and quashing the same.

Or in the alternative;

(iii) issue a writ of mandamus or any other appropriate writ,

direction or order commanding respondents 1 to 4 to treat Exhibits P2 and P6 notifications as open tender notifications and to award the work covered by the said notifications accordingly.

(iv) Issue such other further reliefs as this Honourable Court deem fit and proper to grant in the circumstances of the case."

6. Learned single Judge considered the contentions put forward by the appellant and the respondents in great detail and dismissed the Writ Petition. Learned single Judge held that even if the decision to award the contract to the fifth respondent is set aside, the writ petitioner would not be benefited by the same as the writ petitioner is not pre-qualified. Learned single Judge also found that there is no allegation of malafides against the members of the Pre-qualification Committee. The fact that the fifth respondent is a Central Government Enterprise was also taken note of by the learned single Judge.

7. One of the conditions in Ext.P6 tender notification is that the tenderers should have satisfactorily completed similar works costing at least Rs.1100 lakhs in a single work during the past five years. The appellant does not satisfy this requirement as on the date of Ext.P6 notification, since, even according to the appellant, it had not completed works involving more than Rs.1100 lakhs within the period of five years next before the date of notification. That the appellant is not qualified as on

the date of Ext.P6 is not in dispute. The contention of the appellant is that as per Ext.P2 notification dated 2.2.2006, which was originally issued, the appellant was qualified to participate in the tender as it had completed the work of similar nature on 28.2.2001, within five years preceding the date of Ext.P2 notification. On the admitted facts, the contention of the appellant that it was entitled to be pre-qualified is without substance.

8. Another contention raised by the appellant is that acceptance of the tender of the fifth respondent was illegal as there were only two pre-qualified tenderers, out of whom, fifth respondent was selected. The appellant relies on Ext.P9 Government Order dated 9th June, 1999, in support of this contention, wherein the following condition is stipulated:

> "There should be a minimum of four (4) Pre-qualified contractors to ensure fair and reasonable competition. If the number of contractors is less than four, even after repeated attempts for pre-qualification of the contractors for a work, then open tender system may be resorted to."

The appellant contends that since there were only two pre-qualified contractors, the only option was either to go for a fresh pre-qualification of contractors or for resorting to an open tender as provided in Ext.P9.

9. In the matter of awarding contracts in the Public Works Department, the Government had issued Ext.P1 notification dated 7th July, 1987, wherein it was noticed that while adopting open tender system,

instances occurred where contractors who had been awarded works, either abandoned the work or delayed the work due to insufficiency or lack resources and this has often resulted in the Department failing to achieve the targets and also inviting public criticism. It was also noticed in Ext.P1 that in National Highway Projects financed by the Government of India and in World Bank aided projects, the system of pre-qualification of contractors has been adopted with a view to overcome such difficulties. In Ext.P1 certain orders were issued. Sub-clause (iv) of clause (2) therein reads as follows:

> "(iv) There should be a minimum of four (4) pre-qualified contractors to ensure fair and reasonable competition. In the alternative open tender system will be resorted to."

10. In the Irrigation Department, the system of pre-qualification of contractors was adopted as per Government Order dated 8.2.1993. For the works involving Rs.500 lakhs to Rs.2000 lakhs, "two cover system" was introduced. Government Orders and clarifications were issued thereafter in 1996, 1997 and 1998. The Government issued G.O.(MS) No.43/99/IRD dated 9.6.1999 (Ext.P9), relevant portion of which is extracted below:

> "After having examined the said suggestions in detail and by cancellation of the orders in G.O.(MS).84/98/IRD dated 13.08.1998, Government are pleased to issue the following revised orders for selection of pre-qualified contractors for the Irrigation Department.
>
> 4(1) The system of pre-qualification of contractors will

be adopted by the Irrigation Department for the works specified in Clause 4(2) below:-

4 (2) Pre-qualification bids shall be invited from contractors for different types of works as per norms given below:-

(a) For specialized works such as non over flow section of dam, over flow structures such as spillway of dam, tunnel. Estimate cost of Rs.300 lakhs or more.
(b) Canal formation including C.D. works and other Irrigation works. Estimate cost – Rs.125 lakhs or more.
(c) Construction of aqueduct, bridge, bridge-cum-regulator, canal, lock cum regulator, cut and cover and such other works at estimate cost of Rs.100 lakhs or more.
(d) Construction of sea wall, flood bank, flood protection, flood control works at estimate cost Rs.125 lakhs or more.
(e) Contractors pre-qualification along with invitation of bids may also be made in case of special projects, involving complexity of designs/construction and/or where it is deemed necessary even if the cost is below Rs.100 lakhs.

5.There should be a minimum of four (4) pre-qualified contractors to ensure fair and reasonable competition. If the number of contractors is less than four, even after repeated attempts for pre-qualification of the contractors for a work, then open tender system may be resorted to."

10. Based on Ext.P9 the contention of the appellant is that repeated pre-qualification process should have been adopted and if the required number of four contractors were not pre-qualified, an open tender should have been made. It is submitted by the appellant that if an open tender was to be held, it could participate in such open tender irrespective of the disqualification in the pre-qualification bid.

11. In the counter affidavit filed by the third respondent, it is stated thus:

> "9. It is submitted that as per the No.7365/H3/2000/PWD dated, 01.04.2000 there is no need to have four pre-qualified tenders since tender is invited under double cover system. The Government has considered all aspects and Government issued orders to select two tenders as pre-qualified."

The clarification dated 1st April, 2000, referred to in the counter affidavit (Ext.R3(2)) was issued by the Principal Secretary to Government, which reads as follows:

> "I am to invite your attention to the references cited wherein you have suggested certain modifications to the Government Order dated 7.7.1987. On examination it is found that the competition among the contractors are ensured while submitting the technical bid and financial bid together (double cover system) introduced as per G.O.2nd cited. The double cover system was sanctioned as a further improvement upon the pre-qualification method of tendering. This system stays out possibility of cartelisation among tenderers. I am to inform you that the requirement of minimum number of effective tender response is not relevant for double cover system nor has Government imposed any such restrictions."

12. It is also contended by the third respondent that M/s.Engineering Project (India) Ltd. is a Government of India Enterprise, having enough experience in the field concerned. In the additional counter affidavit dated 3rd July, 2007, filed by the third respondent, it is stated that the fifth respondent could complete several works successfully throughout the

country. Reliance was placed on the certificate of experience dated 4.5.2006 issued by the Calcutta Port Trust. The fifth respondent company is an ISO certified company and they have received merit certificates from His Excellency the President of India (Ext.R3(4)) for excellence in the achievement of MOU targets for the year 2001-2002; His Excellency the Vice President of India (Ext.R3(5)) dated 4th May, 2002 and Ext.R3(6) certificate dated 4th May, 2002. The fifth respondent is awarded with a merit certificate for Excellence for the year 1998-99 by the Honourable Prime Minister of India, as evidenced by Ext.R3(7) certificate dated 1st April, 2000. The financial stability of the fifth respondent is sought to be proved by the production of Ext.R3(8) certificate dated 8th September, 2006. It is also stated in the additional counter affidavit by the third respondent that the fifth respondent is one of the best companies owned by the Central Government and that the fifth respondent is highly qualified having great experience and assets worth crores of rupees. It is also stated that on 20th June, 2007, the fifth respondent had executed the necessary agreement for execution of the work in question. The execution of the work is delayed due to the pendency of the Writ Petition and the order to maintain status quo.

13. In the additional counter affidavit dated 3rd July, 2007, filed by the third respondent, it is further stated thus:

"Normally after inviting tenders by the Superintending

> Engineer pre-qualification documents will be sent to the Chief Engineer and after scrutiny the same will be forwarded to the Scrutiny Committee consisting of Chief Engineers of PWD (Administration), Irrigation (Administration), the Deputy Secretary of Finance Department and also the Chief Engineer of Harbour Engineering Department, the Convenor. As there was only two pre-qualified tenderers the matter was referred to the government by the Tender Committee. If there were four or more persons the pre-qualification committee could have approved the pre-qualification. In this case the matter was submitted to the Government and as per Ext.R1(1) the government approved the pre-qualification and subsequently the Chief Engineer of Harbour Engineering Department directed this department to execute an agreement and proceed with the tender formalities."

14. As per a direction issued by the learned single Judge, the Government Pleader filed a memo dated 12th July, 2007. Along with the memo, the minutes of the Pre-qualification Committee meeting was produced.

15. The appellant is not qualified to get the contract work in question. This is more or less admitted. The contention of the appellant is that the pre-qualification process should be repeated and if it does not result in getting sufficient number of pre-qualified tenderers, there should be an open tender. This contention is unsustainable. The chance of the appellant in getting the contract is a remote possibility even if such a course is adopted. The appellant would get an opportunity to participate in an open bid only if sufficient number of tenderers do not get pre-qualified in the repeated attempt. Public interest would be at peril if such repeated

process is adhered to, in the facts and circumstances of the case. The facts revealed in the case would sufficiently indicate that the appellant is not qualified to be entrusted with the contract work in question. At the instance of the appellant, it is not proper to exercise jurisdiction under Article 226 of the Constitution of India and to upset the whole process of tender. Having not qualified in the pre-qualification bid, we agree with the learned Single Judge that the appellant/writ petitioner could not make out a grievance on the basis of one of the clauses in Exhibit P9, which was later clarified in Exhibit R3 (2) dated 1-4-2000.

16. The fifth respondent is not a private individual or organization, but a Government of India undertaking. There is no allegation of malafies in the Writ Petition. It cannot be contended that awarding the contract to the 5th respondent was the result of any corrupt practice adopted or favouritism shown by the persons concerned, in the process of selection of tenderers. There is no such allegation also. When a Government of India undertaking is selected in the process of the two cover system of tender, unless there are adequate grounds for interference, this court would not be justified in substituting its opinion for the well considered decision of the respondents.

17. The petitioner/appellant could not successfully establish that the

fifth respondent does not have the requisite qualification for being selected in the pre-qualification bid. The appellant itself being not qualified, any such challenge would be of no consequence. The facts and materials produced in the case would show that selection of the 5th respondent was only just and proper. It is also relevant to note that RDS Project Limited, which was pre-qualified along with the fifth respondent, has not challenged the award of contract in favour of the fifth respondent.

18. The contention put forward by the learned Government Pleader that in view of Exhibit R 3 (2) clarification, the requirement of there being at least four pre-qualified tenderers is not applicable to double cover system, as is followed in the case on hand, is quite plausible and acceptable. The appellant cannot seek to upset the whole process of tender proceedings on the basis of a stipulation in Exhibit P9, which is subsequently clarified by Exhibit R 3 (2) clarification, particularly when the appellant was not pre-qualified.

We have carefully considered the pleadings and documents produced in the case and the judgment of the learned Single Judge. We are of the view that the learned Single Judge has correctly applied the principles of law to the admitted and proved facts. We concur with the reasonings made and conclusion arrived at by the learned Single Judge.

There is no merit in the Writ Appeal. The Writ Appeal is accordingly dismissed.

(H.L.DATTU)
Chief Justice

(K.T.SANKARAN)
Judge

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